(1) Supreme Court, U.S.
FILED

No. 2000 00-313 AUG 28 2000

IN THE

Supreme Court of the United States

_____ TERM, 2000

MICHAEL L. ADKINS and ROBERTA B. ADKINS,

Petitioners

v.

UNCLE BART'S INC., dba, UNCLE BART'S CLUB et al.

Respondents

Petitioner for a Writ of Certiorari to the Supreme Court of Utah

PETITION FOR A WRIT OF CERTIORARI

James D. Garrett
GARRETT & GARRETT
2091 East 1300 South, Suite 201
Salt Lake City, Utah 84108
801-581-1144
Counsel for Petitioner

75pp

QUESTIONS PRESENTED

A. Did the Supreme Court of the State of Utah violate the Petitioners equal protection and due process rights under the Fourteenth Amendment to the Constitution of the United States, by deciding that a "wrongful death" action was not provided for in the Utah "Dramshop Act"?

B. Did the Utah Supreme Court Violate the Due Process Rights of Petitioners by Failing to Observe the Requirements of the Utah Constitution?

C. Did the Utah Supreme Court violate Petitioners Fourteenth Amendment rights by encroaching upon the power of the Utah State Legislature in failing to observe and apply the intent language of the Legislature in an Amendment to the "Dramshop Act", that provided that "wrongful death" was a right included within the "Dramshop Act".

D. Did the Utah Supreme Court violate Petitioners Equal Protection and Due Process rights by overruling Petitioners judgment against Respondents for punitive damage.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption:

CHARLEY'S CLUB INC., dba CHARLEY'S CLUB, CLUB MANAGEMENT INC., JAMES D. MICKELSON, DOUGLAS J. MICKELSON, JEANNIE B. MICKELSON, MARLENE M. MICKELSON, JUDY DUKE, AND TRACY DUKE,

were appellees before the Utah Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Michael L. Adkins and Roberta B. Adkins, respectfully request that a Writ of Certiorari be issued to review the judgment of the Utah Supreme Court in this case.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at *Adkins v. Uncle Bart's Inc., et al.*, 1 P.3d 528 (2000). (App. A) The order of the District Court (App. B) and the Memorandum decision of the District Court (App. C) are not published but can be found in case number 940907146 in the Third Judicial District Court for Salt Lake County, State of Utah.

STATEMENT OF JURISDICTION

The judgment of the Utah Supreme Court was entered on January 18, 2000. The Utah Supreme Court denied a timely Petition for Rehearing on May 31, 2000. (App. D) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. (State courts: certiorari.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within his jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Sean Adkins the seventeen-year-old son of Petitioners was killed by a drunken driver in an automobile accident that occurred on March 1, 1994, in Salt Lake City, Utah.

Uncle Bart's Inc., and Charley's Club Inc., two of the respondents are clubs licensed to sell alcoholic beverages to their members. Club Management Inc., is a corporation organized by the individual defendants to provide management services to the two clubs. The individual defendants are members of the same family and own and operate the two liquor clubs.

The willful misconduct of the drunken driver causing the death was readily apparent. His blood alcohol content at the time of the accident was 0.27 percent, which is three times the statutory limit in the State of Utah. The evidence at trial showed that all of the alcohol that he consumed on the day of the accident was provided to him by the two liquor providers. (Respondents)

Before trial, the individual defendants were dismissed by the Trial Court. The Court also ruled that the Utah death statutes applied to the "Dramshop Act" claim. (App. E) The jury returned a verdict against the two clubs, for $7,725.73 for funeral expenses, $1,000,000 general damage, $250,000 punitive damages against Uncle Bart's Club, and $100,000 punitive damages against Charley's Club.

Post trial the Lower Court ruled that general damages would be reduced to $400,000 based upon the

Courts interpretation of the damage limitation in the "Dramshop Act". (Lower Court decision, App. C).

Both sides appealed to the Utah Supreme Court. That Court issued its written opinion holding that the "Dramshop Act" was Petitioners exclusive remedy, that the "Dramshop Act" did not contain an action for wrongful death, that Petitioners had no common law claims against the liquor providers and no claims based upon violations of other provisions of the Utah Alcoholic Beverage Control Act. Thus, except for funeral expenses, Petitioners were denied any cause of action against the licensed clubs, and the owners and management of the clubs who provided the intoxicating liquor to the drunk driver.

The Federal question of the violation of the Fourteenth Amendment did not arise until the Utah Supreme Court issued its opinion. The Constitution issues were address in the Petitioners petition for rehearing. The Utah Supreme Court denied the Petition for rehearing without comment on May 31, 2000.

REASONS FOR GRANTING A WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE UTAH SUPREME COURT DECISION VIOLATES PETITIONERS RIGHT TO EQUAL PROTECTION OF THE LAWS AND DUE PROCESS.

A. The Utah Supreme Court Decision Creates an Unreasonable and Arbitrary Classification Unrelated To Any Compelling Governmental Interest.

It is not possible to define every right that may be violated under the Fourteenth Amendment. It clearly applies to discrimination based upon race, and gender and

other large classes. But it applies with equal force to smaller classes or individuals. *Hill v. Texas*, 316 U.S. 400 (1942).

It is the quality of right that is the principle emphasized in the Equal Protection Clause of the Fourteenth Amendment. *Concordia Fire Ins. Co., v. Illinois*, 292 U.S. 535 (1934); *Craig v. Boren*, 429 U. S. 190 (1976).

The Fourteenth Amendment can be violated by any State institution including State Courts. See the concurring opinion by Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

To survive the Equal Protection challenge in a case such as this, the proponent of the case must show that the discrimination between classes is rationally related to a compelling governmental purpose. The decision of the Utah Supreme Court is completely silent on the issue of governmental purpose of the decision. The opinion merely states that wrongful death is not an included right in the Dramshop Act.

Petitioner's position is best typified by the conclusion reached by the Lower Court, (App C) when that Court stated in substance that to determine that wrongful death was not included within the rights granted by the Dramshop Act would be an absurdity.[1]

The Dramshop Act grants a right to a cause of action for injury to a person. The logical extension to that

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[1] The matter of wrongful death not being included within the Dramshop Act was raised for the first time post verdict by the Utah Licensed Beverage Association an amicus curia.

statement is that injury must always precede death. Even if death occurs almost simultaneously, still there must be an underlying injury. The only logical way to interpret the statute would be to include wrongful death as the natural result of an injury. Decedents death can be thought of as occurring in stages, first injury, then death. Death could not occur without an injury first, even if there was very little time between injury and death.

The Utah Supreme Court has divided the injured into two classes, those who are injured and live, and those who are injured and die.

Consider this example: A drunken driver who, after imbibing alcohol furnished by a licensed provider, drives into a school crossing and strikes two children; one of the children is injured and one dies. Under the Utah decision the injured child is granted a cause of action under the Dramshop Act, but no one has a cause of action for the wrongful death for the deceased child against the liquor provider.

To ignore the proper interpretation of the statute and thereby create an arbitrary and invidious classification, the Court violated the Equal Protection rights of the Petitioners. *Stanton v. Stanton,* 421 U.S. 7 (1975); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana,* 391 U.S. 68 (1968); *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968). *City of Clebourne v. Clebourne Living Center*, 473 U.S. 432 (1985)

B. Did the Utah Supreme Court Violate the Due Process Rights of the Petitioners by Failing to Observe the Requirements of the Utah Constitution.

Closely coupled with the creation by the Court of an unreasonable classification which discriminates against those who would have a wrongful death claim, the Court violated the due process rights of Petitioners under the Fourteenth Amendment by failing to heed to provisions of the Utah Constitution, these are Article 1 Section 11 (Courts open – Redress of injuries.) which reads, "All courts shall be open, and every person, for any injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party." And Article 16 Section 5 (Injuries resulting in death – Damages.) "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law."

When the Utah Supreme Court narrowly construed the Dramshop Act, it excluded a cause of action for wrongful death. It ignored the two Utah Constitutional provisions cited above and thereby violated the due process rights of Petitioners. *Richmond Newspapers, Inc., v. Virginia* 488 U.S. 555 (1980).

C. Curative Legislation

If the decision of the Utah Supreme Court is correct and in fact the Dramshop Act in effect at the time decedent died, did not include a cause of action for wrongful death, then the statute itself violates the Equal Protection Rights of Petitioners, because it deprives them of a remedy for

wrongful death, but grants a remedy to those who are injured.

However, in 1997 the Utah Legislature in clear language amended the Dramshop Liability Act and specifically provided for liability for the death of a third person based upon the violation of the Dramshop Act. This amendment became effective January 1, 1998. (App. F). At the same time both the House and Senate of the Utah Legislature adopted identical "intent language" to accompany the amendment. This intent language stated that the Amendment did not create a new right but merely clarifies that a person has a right to recover damages for wrongful death under the Dramshop Act, as it existed prior to the Amendment. (App. G & H).

During the briefing and argument before the Utah Supreme Court it was pointed out that when the Dramshop Liability Act was amended the Legislature of the State of Utah, set forth the "intent language" which clearly stated that the Amendment does not create a new right by merely clarifies that a person has a right to recover damages for wrongful death, under the Dramshop Act, as it existed at the time of the death in this case. The intent language was binding on the Court. (See App. G & H).

The Supreme Court of Utah was fully aware of the Amended Act and the intent language because it is mentioned in the decision, but the Court held that the intent language relates only to common law and other statutory violations. The decision essentially ignores the fact that the Utah State Legislature instructed the Court that wrongful death was included in the Dramshop Act, as it existed at the time of the death in this case.

By ignoring the directives of the Legislature and the Utah Constitutional provisions (Open Courts and Wrongful Death), the Court has violated the rights of Petitioner to Due Process as well as Equal Protection under the Fourteenth Amendment.

D. Separation of Powers

A fundamental Constitutional principle is that the judiciary may not encroach upon the functions of another branch or usurp its powers. *Northern Sec. Co., v. U. S.* 193 U.S. 197; *Schnell v. Peter Eckrich & Sons Inc.*, 365 U.S. 260 (1961).

Before the Utah Court issued its opinion it had before it the amended "Dramshop Act" together with the intent language of the Legislature, which accompanied the Amendment. The ordinary meaning of the words used by the Legislature is that wrongful death is a right granted by the Act for a violation by a liquor provider. The Legislature went further and adopted intent language (App. G & H), which stated in clear terms that the Amendment to the Act did not create a new right but merely clarified the fact that a person has a right to recover damages for wrongful death under the Dramshop Act as it existed before the Amendment and at the time of the death in this case. The Utah Supreme Court chose to ignore the plain meaning of the intent language. In so doing it encroached upon the domain of the Legislature. The Court was not at liberty to make the law but only to declare the law and apply it as intended by the Legislature. Totally denying Petitioners a cause of action for wrongful death, the Court entered the forbidden field of Judicial Legislation thereby denying to Petitioners Due Process and Equal Protection of the law. *Union Bridge Co., v. United States*, 204 U. S. 364(1907);

NAACP v. Alabama, 377 U.S. 288 (1964); *Barrows v. Jackson,* 346 U.S. 249 (1953).

E. Punitive Damage

Utah has a statute relating to punitive damages, it is reproduced as App. I.

The statute states in substance that punitive damages may be awarded if compensatory or general damages are awarded. Petitioners recovered judgment for funeral expenses in the amount of $7,725.73, $1,000,000 general damage, and $250,000 against Uncle Bart's Club, and $100,000 against Charlie's Club for punitive damages. The Utah Supreme Court overturned the general damage award on the ground that the statute did not contain wrongful death provisions. It overturned the punitive damage award on the ground that the statute did not specifically allow punitive damages. It did however allow Petitioners to retain their judgment for funeral expenses.

The Utah Statute on punitive damages in substance states that punitive damages may be awarded if general or compensatory damages are awarded.

On April 13, 1999 the Utah Supreme Court decided *Taylor v. Johnson,* 99 UT 35, 977 P.2d 479 (1999). In that case the Plaintiff was awarded judgment against a drunk driver for $10,339 in compensatory damages, which included $339 in medical expense, and $25,000 in punitive damage. On appeal the Court held that the award of compensatory damage could not stand because the medical expense amount of $339 did not reach the no fault insurance threshold and therefore the Plaintiff could not bring suit for compensatory damage.

However, the Court went on to affirm the $25,000 punitive judgment on the ground that the Plaintiff had in fact sustained compensatory damage, even though the no fault statute barred recovery.

In our case the Utah Court did affirm the award for funeral expenses, which is compensatory damage, but then overturned the award for punitive damage, stating in effect that the statute did not mention punitive damage and therefore it would not be allowed. The inconsistency between the two decisions is clear. In the *Taylor* case, the statute barred an action for compensatory damage; in our case the Court stated that the statute barred an action for wrongful death. However, in the one case punitive damages were allowed and in our case they were not.

Here again the Court has created an arbitrary and invidious classification. Some citizens of the state of Utah can sue for punitive damages and some cannot. But the Court has given no rational basis for the distinction. This is a fairness issue, which, is implicit in the Equal Protection of the laws.

The Utah Court does mention the damage cap contained in the Dramshop Act, (App. E) but does not explain why the damage cap has any bearing on the question of punitive damages. The damage cap relates only to a violation of the act. Punitive damages arise from willful and malicious conduct and serve a different legal purpose and that is as deterrence.

CONCLUSION

The Supreme Court of the State of Utah decided that the Utah Dramshop Act did not include a wrongful death action against alcohol providers. It then held that Petitioners only right of action against alcohol providers

was the Dramshop Act. It went further and ruled that Petitioners had no cause of action based upon common law theory or violation of alcohol statutes other than the Dramshop Act. To reach that decision the Court totally ignored the directives of the Utah Legislature which, by intent language accompanying an amendment to the Dramshop Act, plainly stated that the amendment did not grant a new right for wrongful death but only clarified the fact that wrongful death was included in the Dramshop Act in effect at the time of the death in this case. The Court then created, or perpetuated a statute that created an arbitrary, invidious classification not related to any rational governmental purpose and voided Petitioners judgment for general and punitive damages. The decision does nothing to reduce the carnage created by drunk drivers and grants alcohol providers an open season on innocent citizens who are killed. Equal Protection and Due Process violations are readily apparent.

The Petition for Writ of Certiorari should be granted.

James D. Garrett
GARRETT & GARRETT
2091 East 1300 South, Suite 201
Salt Lake City, Utah 84108

801-581-1144

Appendix A

IN THE SUPREME COURT OF THE STATE OF UTAH

Michael L. Adkins and Roberta B. Adkins,
Plaintiffs, Appellants, and Cross-Appellees,

v.
Uncle Bart's, Inc. dba Uncle Bart's Club,
and Charley's Club, Inc. dba Charley's Club,
Defendants, Appellees, and Cross-Appellants,
and Club Management, Inc., James D. Mickelson,
Douglas J. Mickelson, Jeannie B. Mickelson,
Marlene M. Mickelson, Judy Duke, and Tracy Duke,
Defendants and Appellees.

No. 970261
FILED
January 18, 2000
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Third District, Salt Lake County
The Honorable Timothy R. Hanson

Attorneys:
Edward M. Garrett, James D. Garrett, Salt Lake City, for Adkins
Donald J. Purser, Darci Dow, Salt Lake City, for Uncle Bart's, Inc.
Mark L. Anderson, Salt Lake City, for Charley's Club, Inc., Mickelsons, and Dukes

Stuart W. Hinckley, David W. Scofield, Salt Lake City, for amicus curiae Utah Licensed Beverage Association and Utah Hospitality Association

HOWE, Chief Justice:

INTRODUCTION

1 Plaintiffs Michael L. Adkins and Roberta A. Adkins appeal from a judgment entered by the trial court after the court reduced the amount of damages awarded them by a jury in accordance with the Utah Dramshop Act, Utah Code Ann. § 32A-14-101 (1994). Defendants Uncle Bart's, Inc., d/b/a Uncle Bart's Club, and Charley's Club, Inc., cross-appeal contending that plaintiffs have no cause of action against them under the Dramshop Act.

BACKGROUND

2 On March 1, 1994, seventeen-year-old Sean Adkins was one of seven teenage boys riding in a seven-passenger station wagon being driven by Scott Buchanan. The boys, all students at Highland High School in Salt Lake City, were traveling to Bountiful, Utah, to watch their school basketball team play in a tournament. They left Highland High School at approximately 6:45 p.m. and headed west on Interstate 80 through South Salt Lake City. As they approached the junction of Interstate 80 with northbound Interstate 15, one of the tires on the vehicle went flat. Buchanan drove to the northbound Interstate 15 "collector" route and parked the vehicle on the road's margin/emergency lane.

3 After the vehicle stopped, several of the boys stayed in the car to keep the brake lights on, but others, including Sean, gathered behind the disabled vehicle. Near this same time, a vehicle driven by defendant Paul Bredehoft entered the collector route and traveled north on the road's margin/emergency lane at an estimated speed of 60-65 miles per hour. Bredehoft did not reduce his speed and collided with the disabled Buchanan vehicle. Immediately prior to the impact, three of the boys who had been standing behind the Buchanan vehicle leaped over the side guardrail to safety. However, Sean, who had been standing closer to the lane of travel than the others, was struck by the Bredehoft vehicle and killed.

4 Bredehoft was arrested at the scene. Toxicology reports showed that at the time of the accident his blood alcohol percentage was .27 percent, more than three times the legal limit for operating a motor vehicle. See Utah Code Ann. § 41-6-44(1)(a)(i) (1994).(1) Facts gathered following the accident established that in the two-and-one-half-hour period prior to colliding with the Buchanan vehicle, Bredehoft had consumed approximately 18-24 ounces of alcohol while patronizing Uncle Bart's Club, Charley's Club, and Ann Sistties's The Clubhouse,(2) three private drinking establishments.

5 Under a theory of wrongful death, the plaintiffs, Sean's parents, brought this action against Uncle Bart's Club and Charley's Club (together the "dramshop defendants"), Ann Sisttie (dba the Clubhouse), Club Management, Inc.,(3) and Paul Bredehoft. The plaintiffs contended that the dramshop defendants, Ann Sisttie, and Club Management were vicariously responsible for their son's death because they

provided Bredehoft with alcohol after he was legally inebriated. The plaintiffs also named James D. Mickelson, Douglas J. Mickelson, Jeannie B. Mickelson, Marlene M. Mickelson, Judy Duke, and Tracy Duke (collectively, the "dramshop owners") as defendants. The complaint alleged that the dramshop owners were personally liable for selling liquor to Bredehoft and as the alter egos of the dramshop corporations.

6 During pretrial proceedings, the dramshop defendants, Ann Sisttie, Club Management, and the dramshop owners moved for summary judgment on several grounds. The dramshop owners and Club Management contended that under Utah law they were not personally liable for the acts of the dramshops which were Utah corporations. The dramshop defendants asked the court to rule that the Dramshop Act provided plaintiffs their exclusive remedy against them, that under the Dramshop Act punitive damages could not be awarded, and that any damages awarded plaintiffs could not exceed the $100,000 cap set forth in the Dramshop Act. The trial court granted the motions of the dramshop owners and Club Management and dismissed the plaintiffs' complaints against them. The trial court then ruled that the Dramshop Act provided plaintiffs' exclusive remedy against the dramshop defendants and Ann Sisttie, and it dismissed plaintiffs' claim under the Utah Liquor Control Act and their claim of common law negligence. The court also ruled that punitive damages were not prohibited by the Dramshop Act but reserved its ruling on capping damages.

7 Thereafter, a jury trial was held with Bredehoft, Uncle Bart's Club, Charley's Club, and Ann Sisttie as defendants.

The jury returned a verdict against Bredehoft, Uncle Bart's Club, and Charley's Club, but found no cause of action existed against Ann Sisttie. The jury awarded damages in favor of plaintiffs and against Bredehoft and the dramshop defendants in the amounts of $7,725.73 for special damages and $1,000,000 for general damages. The jury also returned a separate verdict which awarded the plaintiffs punitive damages in the amount of $500,000 against Bredehoft, $250,000 against Uncle Bart's Club, and $100,000 against Charley's Club.

8 Following the verdict, the trial court ruled that the Dramshop Act's damage cap was constitutional and required a reduction of damages against the dramshop defendants. The court relied on that portion of the Act which reads: "The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after July 1, 1985, is limited to $100,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to $300,000." Utah Code Ann. § 32A-14-101(5) (1994).(4)

9 In an attempt to follow the Dramshop Act's limitation on damages, the trial court reduced the jury award and entered a judgment of $200,000 each against Uncle Bart's Club and Charley's Club--or a judgment in favor of each plaintiff in the amount of $100,000 against each dramshop defendant for special and compensatory damages. The court then ruled that an award of punitive damages would not be subject to the Dramshop Act's limitation on damages and awarded the plaintiffs $250,000 in punitive damages against Uncle Bart's Club and $100,000 in punitive damages against Uncle Charley's Club. Finally, the court entered judgment against

Bredehoft in the amount of $1,507,725.73, representing the full jury award of $7,725.73 in special damages, $500,000 in punitive damages, and $1,000,000 in general damages.

10 Plaintiffs appeal contending that the trial court erred by (1) ruling that the Dramshop Act provided the exclusive remedy for their son's death, (2) dismissing their claim brought under the Liquor Control Act, (3) dismissing their claim alleging common law negligence, and (4) reducing the jury's award of damages. The dramshop defendants cross-appeal contending the plaintiffs do not have a cause of action against them under the Dramshop Act and that the court erred by not dismissing plaintiffs' complaint against them. Bredehoft does not appeal.

STANDARD OF REVIEW

11 When reviewing statutory interpretation, we review for correctness and give no deference to the conclusions of the trial court. See Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997).

ANALYSIS

I. DRAMSHOP ACT AS EXCLUSIVE REMEDY

12 The plaintiffs contend that the trial court erred when it dismissed their claim alleging common law negligence and their claim brought under the Liquor Control Act, and by ruling that the Dramshop Act provided their exclusive remedy against the dramshop defendants. To determine whether the trial court erred, we first analyze whether the plaintiffs had a cause of action for negligence against the dramshop defendants at common law. We will then

determine whether they have a cause of action under the Liquor Control Act. If they could have recovered against the dramshop defendants under either or both of these theories prior to the enactment of the Dramshop Act in 1981, we must then determine whether the trial court properly ruled that the Act preempted those causes of action and now serves as the plaintiffs' exclusive remedy.

13 At common law, third parties did not generally have a cause of action against dramshops which provided alcohol to another who became intoxicated and caused personal injury. 45 Am. Jur. 2d Intoxicating Liquors § 502 (1999); see also Annotation, Right of Action at Common Law for Damage Sustained by Plaintiff in Consequence of Sale or Gift of Intoxicating Liquor or Habit-forming Drugs to Another, 97 A.L.R.3d 528 (1980). The legal theory behind the general rule is that when a third party is injured by an inebriated individual, it is the drinking of the alcohol, not the furnishing of it, which proximately causes the injury. See Yost v. State, 640 P.2d 1044, 1046 n.2 (Utah 1981).

14 A few courts have held that the selling of liquor to a visibly intoxicated person may be found by a jury to constitute a foreseeable unreasonable risk of harm to others through action of the intoxicated person and that such negligence cannot be held as a matter of law not to be a proximate cause of resulting injuries. See, e.g., Rappaport v. Nichols, 31 N.J. 188, 204, 156 A.2d 1, 9, (1959); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977).

15 Prior to the enactment of the Dramshop Act, Utah did not recognize a third-party cause of action against dramshops. However, in Rees v. Albertson's, Inc., 587

P.2d 130, 133 (Utah 1978), and again in Yost v. State, 640 P.2d at 1046, this court held that the negligence of a vendor in selling alcohol to an underage drinker in violation of a statute might be considered in a suit in apportioning negligence among several defendants, but neither case established a common law cause of action in favor of third persons against commercial vendors of alcohol where there was no statutory violation.

16 In 1981, the Dramshop Act was enacted and created a statutory cause of action, which did not exist at common law, against dramshops. Our legislature, like those of other states, passed dramshop legislation to abrogate the common law rule precluding the liability of a party who sells or otherwise provides alcohol to a person who is intoxicated and injures another. Dramshop acts are enacted to fill the void that existed at common law by imposing a form of strict liability on specific individuals who illegally provide alcohol to certain classes of consumers. See Millross v. Plum Hollow Golf Club, 413 N.W.2d 17 (Mich. 1987). "[T]he legislature intended the Dramshop Act to be a complete and self-contained solution to a social problem not adequately addressed at common law." Browder v. International Fidelity Ins. Co., 413 Mich. 603, 321 N.W.2d 668, 675 (1982). We have held that the legislative purpose of the Act "was to compensate innocent third parties by making dramshop owners strictly liable without regard to the finding of fault, wrongful intent, or negligent conduct on their part." Reeves v. Gentile, 813 P.2d 111, 116 (Utah 1991).

17 The plaintiffs point to "intent language" placed in the House and Senate Journals by the legislature when the

Dramshop Act was amended in 1997 to impose liability on dramshops for the death of a third person:

> The express inclusion of wrongful death to Section 31A-14-101 does not create a new right but merely clarifies that a person has the right to recover both special and general damages for wrongful death under the Dramshop Act.
> The bill does not modify any common law right that exists for injuries or wrongful death resulting from giving, selling, or otherwise providing alcoholic beverages.
> Senate Journal, 1997 Sess., at 255, 293; House Journal, 1997 Sess., at 539.

18 The plaintiffs argue that this "intent language" was a recognition by the legislature that a common law right existed against dramshops for wrongful death of third persons. We disagree. The legislature was simply stating that the Act was in addition to any common law right that might exist, but it did not state that a common law right existed. The language is clear and does not aid the plaintiffs. We therefore conclude that because a third-party cause of action against dramshops did not exist in this state at common law, the plaintiffs' common law negligence claim against the dramshop defendants was properly dismissed by the trial court.

19 We next consider whether the trial court erred by dismissing plaintiffs' claim under Utah Code Ann. § 32A-5-107(24)(h) of the Liquor Control Act. Section 32A-5-107 is entitled "operational restrictions" and provides, in part:

> (h) An officer, director, managing agent, employee, and any other person employed by or acting for or in behalf of any licensee, may not sell, deliver, or furnish, or cause or permit to be sold, delivered, or furnished any liquor to any:
> (i) minor;
> (ii) person actually, apparently, or obviously drunk;
>
> (iii) known habitual drunkard; or
>
> (iv) known interdicted person.

Id. The plaintiffs complain that the dramshop defendants violated this section when they sold alcohol to Bredehoft, a known habitual drunkard who was actually, apparently, or obviously drunk. They further contend that the violation served as prima facie evidence of negligence, and thus stated a cause of action against the dramshop defendants.

20 We disagree. The plaintiffs correctly quote Ryan v. Gold Cross Services, Inc., 903 P.2d 423, 426 (Utah 1995), which states, "It is a general rule of Utah law that violation of a safety standard set by statute or ordinance constitutes prima facie evidence of negligence." We agree with this statement of the law. However, we have established that there is no common law basis to support a third-party negligence claim against dramshops. Moreover, Ryan addressed a safety statute whereas section 32A-5-107 governs private club liquor licenses and sets forth the requirements and duties of obtaining and maintaining such licenses in Utah.

21 The section prescribes its own penalties for individuals or establishments which violate its provisions:

> Each corporation or association granted a private club liquor license and its employees, officers, managing agent, and members shall comply with the following conditions and requirements. Failure to comply may result in a suspension or revocation of the license or other disciplinary action taken against individual employees or management personnel.
> Utah Code Ann. 32A-5-107.

Decisions regarding suspensions, revocations, and other disciplinary actions are left to the state liquor control commission. See Pride Club v. Miller, 572 P.2d 385, 387 (Utah 1977). There is nothing in the section which creates a third-party civil cause of action against establishments which violate the liquor licensing prohibitions.

22 We conclude that the trial court did not err in dismissing the plaintiffs' claim brought under section 32A-5-107 of the Liquor Control Act. Plaintiffs' remedy, if any, must be found in the Dramshop Act.

II. CAUSES OF ACTION UNDER THE DRAMSHOP ACT

23 On cross-appeal, the dramshop defendants contend that the trial court erred when it refused to dismiss the plaintiffs' case by ruling that they have a cause of action under the Dramshop Act.

24 To determine whether the plaintiffs have a cause of action, we examine the provisions of the Act. The Act, at

the time of this tragic accident, provided that dramshops which serve alcohol in violation of the Act were liable for "injuries in person, property, or means of support to any third person, or to the spouse, child, or parent of that third person." This language is unambiguous; therefore, "we do not look beyond the language's plain meaning to divine legislative intent." Horton v. Royal Order of the Sun, 821 P.2d 1167, 1168 (Utah 1991). Accordingly, third persons--or the spouse, parent, or child thereof--have a cause of action for "injuries in person, property, or means of support" where they were injured by a person who was served alcohol by a dramshop in violation of the Act.

A. Injuries in Person

25 The dramshop defendants do not dispute that the plaintiffs have suffered mental anguish and grief over their son's death but contend that mental anguish and grief do not amount to "injuries in person." The dramshop defendants construe "injuries in person" to mean "physical bodily injuries." We agree with this interpretation.

26 The mental and emotional anguish which the plaintiffs have suffered does not constitute "bodily injuries" within the meaning of those words as used in the Act. The rule that "injuries in person" means "physical bodily injuries" and not mental or emotional injuries is widely recognized. See Knierim v. Izzo, 174 N.E.2d 157, 161 (Ill. 1961) (holding that mental suffering resulting in no physical injury is not an injury in person and therefore not recoverable under Dramshop Act in action brought by wife following death of husband); Robertson v. White, 136 N.E.2d 550, 554 (Ill. App. Ct. 1956) (holding that emotional pain and suffering

are not compensable injuries under Dramshop Act); State Farm Mut. Auto. Ins. Co. v. Isle, 122 N.W.2d 36, 41 (Minn. 1963) (wife not entitled to damages for injury to person under Dramshop Act based on her mental suffering where she did not sustain accompanying physical injury); Lyons v. Tiedmann, 522 N.Y.S.2d 159, 160-61 (N.Y. App. Div. 1987) (plaintiffs could not recover for conscious pain and suffering and wrongful death under Dramshop Act). See generally George A. Locke, Annotation, Recovery Under Civil Damage (Dram-Shop) Act for Intangibles such as Mental Anguish, Embarrassment, Loss of Affection or Companionship, or the Like, 78 A.L.R.3d 1199 (1978); Annotation, What Constitutes "Injury in Person or Property" Within Civil Damage or Dramshop Act, 6 A.L.R.2d 798 (1949).

B. Injuries in Property

27 The dramshop defendants next contend that the plaintiffs have not suffered injuries in property as a result of their son's death. The defendants specifically argue that loss of "support, comfort, society, counsel and services" does not constitute an injury in property.

28 Although there are no Utah cases which analyze or define "injuries in property" in the Act's context, cases from other jurisdictions have addressed the issue. The Illinois Supreme Court has held that under their Dramshop Act injuries in property include only injuries to real or personal property--not damages for loss of comfort, support, or society of a loved one for which monetary damages might be recoverable under a wrongful death act. Howlett v. Doglio, 83 N.E.2d 708, 713-14 (Ill. 1949)

(holding that mother could not recover under Dramshop Act because her daughter's death did not constitute an injury in property to the mother). However, at least two courts have held that the payment of funeral expenses of a minor child by parents is an "injury to property" within the meaning of a Dramshop Act. Glaesemann v. New Brighton, 268 Minn. 432, 130 N.W.2d 43 (1964); Iszler v. Jorda, 80 N.W.2d 665 (N.D. 1947). Parents are legally obligated to pay funeral expenses of their minor children which results in a diminution of assets of the parents. We agree that funeral costs and attendant expenses to the burial are "injuries to property" of the parents.

C. Injuries in Means of Support

29 The dramshop defendants next contend that the plaintiffs have not suffered injuries in means of support. We agree that "means of support" includes lost wages and the inability to continue to earn a living, not emotional support, comfort, society, etc. See Stevens v. Lou's Lemon Tree, Ltd., 543 N.E.2d 293, 297-98 (Ill. App. Ct. 1989); Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc., 519 N.E.2d 121, 123-25 (Ill. App. Ct. 1988).

30 Here, the plaintiffs have not suffered injuries in means of support because they were not financially supported by their 17-year-old son. See Jones v. Fisher, 309 N.W.2d 726, 730 (Minn. 1981) (money damages for injuries in means of support do not include loss of emotional support but are limited to means of support to dependents); Robertson, 136 N.E.2d at 555 (affirming lower court's dismissal of parents' dramshop suit where deceased child was not financially supporting parent at time of child's

death); see also Angeloff v. Raymond, 388 N.E.2d 1128 (Ill. Ct. App. 1979) (children of father who was shot and killed by intoxicated defendant did not suffer injuries in means of support where father did not provide financial support prior to his death).

D. Death is Not an Injury in Person, Property, or Means of Support under the 1994 Dramshop Act

31 The Act is a legislative enactment which creates a statutory cause of action for specific injuries resulting from its violation. "Application of basic principles of statutory construction forbids an enlargement of the classification of actionable injuries under the Dramshop Act." Rogers v. Dwight, 145 F. Supp. 537, 540 (E.D. Wis. 1957) (citations omitted); see also Richardson v. Matador Steak House, Inc., 948 P.2d 347, 349-50 (Utah 1997) (refusing to enlarge the classification of persons who could recover under Act beyond its clear language). The Act plainly states that to bring an action, a person must have suffered injuries in "person, property, or means of support." Utah Code Ann. 32A-14-101 (1994).

32 The Act does not provide for recovery for death,(5) and because the rights conferred by the Act may not be enlarged, there can be no recovery for death unless the Act expressly states such a right. See 45 Am. Jur. 2d, Intoxicating Liquors § 564 (1969); see also Messenger v. Vogler, 553 N.E.2d 61, 63 (Ill. App. Ct. 1990) (holding that decedents' pain and suffering prior to death may have been compensable under Dramshop Act, but not instantaneous death).

33 We therefore conclude that the plaintiffs have not suffered injuries in person, property--except for funeral and burial expenses--or means of support, and because there was no provision allowing recovery for death under the Dramshop Act when the plaintiffs' son was killed, they have no cause of action to sue the dramshop defendants for their son's death.

III. THE ACT AND THE WRONGFUL DEATH STATUTE

34 Prior to trial, the plaintiffs and the dramshop defendants stipulated that "the elements of damage for a cause of action for the wrongful death of a child as established by the wrongful death statute [Utah Code Ann. 78-11-6] and the interpreted case law of the appellate courts of the state of Utah apply without exception to this cause of action claiming a violation of the Dramshop Liability Act 32A-14-101, UCA (1953)."

35 Based on that stipulation, the trial court entered the following order:

> That the stipulation of defendants as set forth above is the "law of the case" in this action and that the elements of a cause of action for the death of a child as set forth in title 78-11-6 UCA 1953 and the interpretive decisions of the appellate courts of this state apply without exception to the cause of action pending in this court based upon title 32A-14-101 UCA 1953 (Dramshop Liability Act).

The dramshop defendants now contend that despite their stipulation, the trial court erred when it entered the order engrafting the stipulation as the "law of the case."

36 Our wrongful death statute is fault-based and provides parents of a deceased minor child with a cause of action if the death was "caused by the wrongful act or neglect of another." Utah Code Ann. 78-11-6. It must be shown that a defendant negligently breached some duty owed to the child and that the breach proximately caused the death. If those elements can be proven, a parent's recoverable damages may include intangibles such as loss of the child's society, companionship, protection, and affection. See Jones v. Carvell, 641 P.2d 105 (Utah 1982).

37 The Act, on the other hand, is not fault-based, but rather a strict liability statute. Thus, because the Act imposes strict liability on defendants, while the wrongful death statute requires proof of negligence and proximate cause, the two statutes are incompatible and cannot be merged into one cause of action. See Knierim v. Izzo, 174 N.E.2d 157, 160-61 (Ill. 1961) (holding that action against tavern could not be properly maintained under wrongful death statute; damages under Dramshop Act cannot be limited or expanded by wrongful death act); see also Lein v. Peitruszewski, 335 N.E.2d 772, 773 (Ill. 1975) (holding that wrongful death act and Dramshop Act are separate and distinct); Jones v. Fisher, 309 N.W.2d 726, 730-31 (Minn. 1981) (recoverable damages under Dramshop Act are limited to loss of means of support to decedent's dependants; recoverable damages under wrongful death act may include loss of companionship, advice, or counsel); Bongiorno v. D.I.G.I., Inc., 515 N.Y.S.2d 969, 971 (Sup.

Ct. 1987), aff'd, 529 N.Y.S.2d 804 (App. Div. 1988) (noting that wrongful death and dramshop actions are "wholly unrelated both as to scope and purpose").

38 The plaintiffs rely on Beaupre v. Boulevard Billiard Club, 510 A.2d 415 (R.I. 1986), where the court held that recovery for wrongful death could be had under that state's Dramshop Act. However, that Dramshop Act provided for recovery for "any injury." As we have earlier pointed out, our Dramshop Act is drawn narrowly and does not allow recovery for "any injury."

39 The plaintiffs contend, however, that when the trial court entered an order accepting the parties' stipulation--that the elements of a wrongful death action applied to their dramshop action--the stipulation became the controlling law in the case. They also point out the general rule that issues not raised in the trial court cannot be raised for the first time on appeal.

40 The plaintiffs correctly state the rule that "[o]rdinarily, courts are bound by stipulations between parties." First of Denver Mortgage Investors v. C.N. Zundel & Assocs., 600 P.2d 521, 527 (Utah 1979). However, "such is not the case . . . when points of law requiring judicial determination are involved." Id. As we have earlier pointed out in this opinion, the cause of action provided by the Act is purely statutory and narrowly confines the damages recoverable. The Act specifies "injuries to person, property, or means of support." Any expansion of the damages which may be recovered must be undertaken by the legislature, not the courts. Furthermore, as we noted in Kaiserman Associates, Inc. v. Francis Town, 977 P.2d 462, 464 (Utah 1998), "an

overlooked or an abandoned argument should not compel an erroneous result. We should not be forced to ignore the law just because the parties have not raised or pursued obvious arguments." *In this case, we are construing* a legislative act that will be controlling not only in this case but in future cases. We cannot alter a correct construction simply because both parties misconstrued the Act in the trial court.

IV. PUNITIVE DAMAGES

41 The dramshop defendants next contend that punitive damages are not recoverable under the Act and that the trial court erred by allowing them. The Act does not expressly allow for punitive damages and specifically enumerates the damages which may be awarded:

(5) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after July 1, 1985, is limited to $100,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to $300,000. Utah Code Ann. 32A-14-101 (1994) (emphasis added). The legislature's stated purpose in enacting the Dramshop Act "was to compensate innocent third parties by making dramshop owners strictly liable without regard to the finding of fault, wrongful intent, or negligent conduct on their part." Reeves, 813 P.2d at 116. The Act created a cause of action for innocent third parties, and "intended to place the economic consequences of intoxicated behavior primarily on the businesses that profited from the liquor trade." Walter v. Carriage House Hotels, Ltd., 646 N.W.2d 599, 603 (Ill. 1995). The Act is not intended to punish dramshop owners and their employees, and because it does

not expressly permit punitive damages, we will not expand the Act to permit their award. In this conclusion, we are in accord with courts of many other states which allow punitive damages only when expressly authorized by statute. See Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881, 885 (Iowa 1983), and cases cited therein; Coughlin v. Radosevich, 372 N.W.2d 817, 820-21 (Minn. Ct. App. 1985).

V. THE CONSTITUTIONALITY OF THE DAMAGE CAP

42 The plaintiffs next contend that the trial court violated several provisions of the Utah Constitution when it capped the damages awardable to them at $400,000 as required by the Act. They assert that the capping violated constitutional provisions guaranteeing open courts and uniform operation of the law and prohibiting special legislation. Inasmuch as we have held that the plaintiffs can recover only funeral and burial expenses, which will be far less than the cap, their constitutional challenges are moot.

VI. ADDITIONAL ARGUMENTS

43 Because the plaintiffs' exclusive remedy lies in the Act, we need not address the plaintiffs' assignment of error regarding the granting of summary judgment dismissing dramshop owners from the action. Moreover, the trial court's refusal to award interest on the amount of the jury verdict and the trial court's granting a stay of execution with a minimum bond are moot questions.

CONCLUSION

44 We conclude that the trial court did not err in determining that the plaintiffs had no cause of action against the dramshop defendants under the Liquor Control Act or at common law based on negligence. Moreover, the plaintiffs did not have a cause of action under the Act because they did not suffer injuries in person, property, except for funeral and burial expenses, or means of support. The trial court erred by accepting the parties' stipulation that a wrongful death action could be brought under the Act, and it erred by allowing an award of punitive damages.

45 We are not unmindful of the deep loss suffered by the plaintiffs in the tragic death of their son. However, judicial restraint prevents us from affording greater recovery to the plaintiffs against the dramshop defendants where the legislature has not so provided.

46 The judgment is reversed and remanded with instructions to enter a judgment in favor of the plaintiffs in the amount of the funeral costs and expenses attendant to burial, together with interest thereon.

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47 Justice Russon concurs in Chief Justice Howe's opinion.

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48 Justice Zimmerman concurs in sections II, III, IV, V, and VI of the majority opinion and in the result of section I.

DURHAM, Associate Chief Justice, dissenting:

49 The majority opinion states categorically that, "[p]rior to the enactment of the Dramshop Act, Utah did not recognize a third-party common law cause of action against dramshops. Maj. Op., 15 (referring to Yost v. State, 640 P.2d 1044 (Utah 1981)); Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978)). I cannot draw the same inference from those cases.

50 In Rees, the plaintiff was a minor and an intoxicated person who had injured third parties and who had been required to pay compensation. See Rees, 587 P.2d at 131. The plaintiff sued Albertson's, seeking contribution on the basis that it had illegally sold the beer that caused the intoxication. See id. The court's analysis turned on foreseeability, and its conclusion was straightforward:

[W]e think reasonable minds could believe that in selling beer to a minor, such as plaintiff, the defendant reasonably should have foreseen the likelihood of it being combined with an automobile and result [sic] in some occurrence such as eventuated here.

To be considered in connection with what has been said above are these principles: that the questions relating to negligence and proximate cause are generally for the fact-trier, court or jury, to determine. A party should not be deprived of the privilege of having such an adjudication of his claims unless it appears that even upon the facts claimed by him he could not establish a basis for recovery.
Id. at 133 (footnotes and citations omitted).

51 The plaintiff in Rees was not suing for his own injuries; he sought contribution and an allocation of liability for injuries to third parties. No claim for contribution could or would lie absent a duty and potential liability running from Albertson's to the third party (hence the court's care to assess the foreseeability of third-party injuries). The Rees court, in fact, recognized the legitimacy of a third-party claim when it permitted the plaintiff to go to trial on the contribution question.

52 Three years later, the court reaffirmed its position in Rees. The plaintiff in Yost v. State, 640 P.2d 1044 (Utah 1981), had been injured in an automobile accident allegedly caused by the defendant's illegal sale of liquor to several minors. See id. at 1045-46. The court declared:

Regardless of the percentage of liability attributable to [the defendant liquor seller] relative to the other defendants, he is liable for [plaintiff] Yost's total damage, reduced by: 1) the percentage of negligence attributed to Yost, and 2) the greater of the amount of the consideration paid by [another defendant, the driver of the vehicle that crashed] for his release, or the amount, if any, by which the release provides that the total claim shall be reduced. Id. at 1048 (footnotes and citations omitted).

53 In other words, the court affirmed an allocation of liability running from the provider of the liquor to a third party injured by an intoxicated minor, subject to a reduction for the plaintiff's own liability. The only theoretical basis for the ruling is a common law cause of action by an injured third party against one who illegally sells liquor.

54 It is, of course, a difficulty that neither Rees nor Yost contains an extensive analysis of the determination that a cause of action would lie, and it is legitimate to ask if the court fully recognized the extent to which it was extending existing common law principles to a type of claim without a solid history in Utah. On the other hand, the lack of scrutiny applied to the question might well reflect an underlying assumption by the court that standard principles of tort analysis (foreseeability, causation, allocation of liability) were applicable as a matter of course to this fact pattern. In any event, I do not believe it to be accurate or adequate to dismiss these holdings summarily, as does the majority opinion. They are definitively based, at the least, on an assumption that the illegal provision of alcohol could give rise to a claim of liability to third parties. I think the majority errs when it asserts that "neither case established a common law cause of action in favor of third persons against commercial vendors of alcohol where there was no statutory violation." Maj. Op., § 15. Neither opinion uses language we might call "establishing," but neither ruling could stand without an assumption that such claims were legitimate. Contribution is not available from a defendant who does not have liability to the injured party in the first place, nor is allocation of liability to such a defendant possible in any other setting.

55 Because the majority's conclusions about the effect of the Dramshop Act are predicated on its conclusion that no common law negligence existed prior to its enactment, I cannot join its reasoning. Furthermore, if in fact such a common law claim existed, it is not clear to me why its persistence would be precluded by the statutory scheme of

the Dramshop Act absent an express determination by the legislature to override related common law. The Dramshop Act contains no such determination, and in fact is strangely devoid of language explaining its purpose.(6)

56 For the foregoing reasons, I dissent from the majority's holding that plaintiffs had no common law cause of action. At the very least, I think this court should have engaged in an independent analysis of whether the common law cause of action acknowledged in our old cases ought, as a matter of policy and law development, to co-exist in the era ushered in by our Dramshop Act, or be definitively abandoned after such an analysis.

57 I agree with the majority's conclusions regarding the interaction of the Dramshop Act and wrongful death claims. The harsh result in this case may in fact reflect one of the factors that ought to be considered in deciding the current vitality of, and need for, the common law cause of action as opposed to the limited remedies provided by the Dramshop Act.

58 Justice Stewart concurs in Associate Chief Justice Durham's dissenting opinion.

1. This section states that "[a] person may not operate or be in actual control of a vehicle within this state if the person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours after the alleged operation or physical control."

2. Ann Sisttie is an individual doing business as The Clubhouse. On the night of the accident, Bredehoft consumed half a beer at The Clubhouse.

3. Club Management is a corporation which was created by the dramshop owners to serve as the management entity of Uncle Bart's Club and Charley's Club.

4. The damage limitation has since been amended to read: "The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after January 1, 1998, is limited to $500,000, and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to $1,000,000." Utah Code Ann. 32A-14-101(6) (1998).

5. In 1997 the legislature amended the Act, and effective January 1, 1998, dramshops which violate the Act can be held liable for "an injury in person, property, or means of support to any third person" and for "the death of a third person." Utah Code Ann. 32A-14-101(1) (emphasis added). That amendment has no force or effect in this case where the plaintiffs' son was killed in 1994.

6. The majority cites language from Reeves v. Gentile, 813 P.2d 111 (Utah 1991), declaring the legislative purpose of the Dramshop Act, but unfortunately, examination of the Reeves opinion reveals no source for the declaration; it appears to have simply been an assumption made by the court based on its assessment of dramshop legislation in general.

Appendix B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL L. ADKINS and
ROBERTA B. ADKINS,
Plaintiffs,
v.

ORDER

Civil No. 940907146

UNCLE BART'S INC., dba UNCLE BART'S CLUB, CHARLEY'S CLUB, INC., dba CHARLEY'S CLUB, ANN SISTIE, dba THE CLUBHOUSE, CLUB MANAGEMENT, Inc.,
Defendants.

On the 5th day of April, 1996, at a hearing on various motions pending in this case, the Defendants and each of them in open Court and on the record stipulated that the elements of damage for a cause of action, for the wrongful death of a child, as established by the Wrongful Death Statute 78-11 (78-11-6) and the interpreted case law of the Appellate Courts of the State of Utah apply without exception to this cause of action claiming a violation of the Dramshop Liability Act 32A-14-101 U.C.A. (1953).

The Court having considered the stipulation of the Defendants now orders:

1. That the Stipulation of Defendants as set forth above is the "law of the case" in this action and that the elements of a cause of action for the death of a child, as set forth in Title 78-11-6 U.C.A. (1953) and the interpretive decisions of the Appellate Courts of this State apply without exception to the cause of action pending in this Court based

upon Title 32A-14-101 U.C.A. (1953) (Dramshop Liability Act).

DATED this 22nd day of April, 1996.

S/_____
Timothy R. Hanson
District Court Judge

Appendix C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL L. ADKINS and ROBERTA A. ADKINS,
Plaintiffs,

v.

UNCLE BART'S INC., dba UNCLE BART'S CLUB, CHARLEY'S CLUB, INC., dba CHARLEY'S CLUB, ANN SISTTIE, dba THE CLUBHOUSE, and PAUL G. BREDEHOFT,
Defendants.

MEMORANDUM DECISION

CASE NO. 940907146

Before the Court is defendants' Motion for Summary Judgment, seeking an Order from this Court limiting damages that can be recoverable from the so called "private club dramshop" defendants to $100,000 per defendant. This Motion was originally filed and partially argued before the case went to trial. At that time, the Court declined to rule on a pretrial basis, but delayed ruling to determine if a verdict in the case would require the Court to address the issue of the Dramshop damage cap.

The case was tried and the jury determined that the private club defendants, along with the defendant driver were responsible for the death of the plaintiffs' son.

(Plaintiffs are the parents of Sean Adkins, killed on March 1, 1994 as a result of being struck by an automobile being driven by defendant Bredehoft.) One liquor provider, Charley's Club, was not found liable under the Dramshop Act. The jury found the defendant driver, Bredehoft, negligent and a proximate cause of Sean Adkins' death. It further found that the defendants Uncle Bart's Club and Charley's Club had violated the Dramshop Act by providing intoxicating liquors to defendant Bredehoft, and that such acts contributed to the driving by Mr. Bredehoft that caused Sean Adkins' death.

The jury returned a verdict finding compensatory damages sustained by the plaintiffs in the total sum of $1,007,725.73. The jury further determined that all defendants found liable for Sean Adkins' death had acted in such a reckless fashion that punitive damages were appropriate.

Following the jury's determination of liability for compensatory damages and the jury's determination that punitive damages were appropriate, the jury was asked to determine an appropriate amount of punitive damages. The jury awarded punitive damages against defendant Bredehoft in the sum of $500,000, against defendant Uncle Bart's in the amount of $250,000, and against defendant Charley's Club in the amount of $100,000.

As indicated above, defendants Uncle Bart's and Charley's Club seek to have this Court limit the Judgment entered against them to the statutory limit contained in the Dramshop Act, to wit: $100,000 for each plaintiff. If the damage cap did not apply, the Judgment on compensatory damages would be the sum of $1,007,725.73 against all liable defendants jointly and severally, each defendant being responsible for the entire Judgment. Punitive damages as

determined by the jury would be in addition to that joint and several Judgments on compensatory damages. The Dramshop Act, passed by the legislature into law, provides that the limit of liability an alcohol beverage provider such as the defendants here may suffer is $100,000 for each person damaged. See, Section 32A-14-101(5), Utah Code Ann., 1953 as amended.

Plaintiffs argue that the damage cap imposed by the legislature is unconstitutional for a number of reasons, all as set forth in the plaintiffs' legal authorities previously filed and cited.

Defendants respond that the right to sue an alcohol provider, such as the defendants in this case, did not exist before the legislature passed into law the Dramshop Act under which the plaintiffs sue in this case, and therefore the legislature created for the first time such a cause of action. The defendants further argue that because the legislature created the right to sue an alcohol provider, it also has the right to limit the recovery thereunder.

Generally, the legislature cannot, without offending the Utah constitution, eliminate or modify existing common law claims. This is particularly true where the claim is one where damages for death are being sought. See, the Constitutional prohibition in Article XVI, Section 5, Utah Constitution.

A close review of the authorities cited by all parties lead this Court to the conclusion that prior to the legislature creating the Dramshop Act, no right to sue an alcohol provider existed at common law in this state, with the exception of providing intoxicating beverages to a minor, and that the Dramshop Act then created for the first time a new, never before existing, cause of action. Even though it

may be repugnant to reduce a jury award as to the private club defendants, particularly in view of the magnitude of the plaintiffs' loss, this Court is not at liberty to ignore the mandates of the Utah State legislature and the damage cap that it has proclaimed will apply to Dramshop causes of action. The legislature has determined that regardless of the degree of loss that an alcohol provider may cause by the violation of the Dramshop Act, the maximum damage that may be allowed is $100,000 to each damaged person.

The Court does not find that the other constitutional provisions relied upon by the plaintiffs could allow this Court to declare the damage cap unconstitutional. Accordingly, this Court is required to grant defendant private clubs' motion to enter the Judgment against them in accordance with the damage limitation imposed by legislative mandate.

Defendants argue that the Dramshop damage cap should also apply to the jury's award of punitive damages. Defendants' argument, if correct, would in this case negate the jury's award of punitive damages.

While the Dramshop Act speaks in terms of "total amount of damages", it is clear from the legislative history that the cap was not intended to deal with that special category of damages called punitive or exemplary. The discussions in the Senate as reported by defendants' counsel who has reviewed the legislative history, clearly point out that one of the purposes of the damage cap was to insure that alcohol providers, such as the defendants here, could obtain insurance coverage for any liability that may be imposed by violation of the Dramshop Act. Punitive or exemplary damages are not generally insurable, because of the extreme nature of the reckless conduct necessary before punitive damages can be imposed. Finally, as an additional

point regarding the applicability of the damage cap to punitive damages, this Court notes that the theory upon which punitive damages are based, that is, conduct which is intentional, willful, malicious or manifests a reckless indifference towards the rights of others, would be totally ignored if punitive damages were capped by the Dramshop Act. The deterrent value of a punitive damage award against these defendants and others so situated to refrain from like egregious conduct in the serving and providing of liquor in the future would be lost.

Accordingly, this Court concludes that the damage cap was intended by the legislature to relate only to compensatory damages, and has no application to the punitive damages award. Finally, this Court turns to the argument advanced by the amicus curiae, the Utah Licensed Beverage Association. It argues that the Dramshop Act excludes from recovery plaintiffs like the Adkins here, because their loss was the result of the death of their son. The Association argues that the wording in the Dramshop Act does not create a cause of action when the violation of the Dramshop Act results in death, but rather only applies where the violation of the Dramshop Act results in something less, such as personal injury or property damage.

The Utah Licensed Beverage Association would have this Court at this post-trial date, determine that the plaintiffs had no cause of action under the Dramshop Act for the death of their son, and further, that the legislature excluded recovery under the Dramshop Act to persons who had been injured as a result of the death of a family member, and that the legislature only intended to provide recovery for injuries that did not result in death.

In other words, the Utah Licensed Beverage Association claims that a person can sue a liquor provider

under the Dramshop Act for the loss of a leg, the loss of an arm, or some other personal injury that does not result in death, but cannot sue if there is a violation of the Dramshop Act that results in the death of a child. Absurd as that statement sounds, and as absurd as that result would be, if that is what the legislature has provided, this Court is not at liberty to change the legislative mandate.

While the courts must follow the clear mandates of legislative statutes, the language relating to the types of injuries and damages that may be sued upon under the Dramshop Act is less than a model of clarity. A fair reading of the statute does not suggest to this Court that the legislature intended to allow recovery for injuries and damages as a result of a violation of the Dramshop Act for any injury or loss, as long as it does not result in death, the greatest loss. Where a legislative statute and its scope are not clear or is ambiguous, this Court should not impose an interpretation upon that legislative statute that causes an unreasonable result. There is no logical reason, either in this record or in the Court's mind that could justify a conclusion that the legislature in creating a statutory right of action against a liquor provider as contained in the Dramshop Act, intended to exclude a cause of action to persons who had suffered a loss because of the death of a child, such as the plaintiffs here. If the legislature was intent on carving out an exception to persons who have a cause of action under the Dramshop Act so as to exclude death claims, it could have easily said so, and it did not. This Court declines to read such an illogical statement into the unclear language of the statute.

As a side note, this Court observes that the Utah Beverage Association did not attempt to intervene when this case was pending before trial. The issues that were presented were certainly a matter of public record, and for

that matter received some public notoriety. Much time and money, both private and public, have been committed to the resolution of this case, which the Utah Licensed Beverage Association now asserts was a nullity. It is further interesting to note that the Utah Licensed Beverage Association intervenes in this case as amicus curiae on the outstanding motion, that is, the damage cap, and now makes the argument that this Court should ignore all that has gone on before, including stipulation of the Club defendants that the wrongful death claims were part of the Dramshop Act.

All of the foregoing suggests to this Court that the position asserted by the Utah Licensed Beverage Association, that the legislature did not intend to create a cause of action in the plaintiffs for the death of their son Sean, is misplaced. The Court declines on its own motion, or otherwise, to so hold.

Based upon the foregoing, the Court will enter Judgment against the defendants who were found liable in the following fashion:

1. Against defendant Paul G. Bredehoft in the sum of $1,007,725.73 as compensatory damages, and the sum of $500,000 as punitive damages, in favor of both plaintiffs.

2. Against the defendant Uncle Bart's Club in the sum of $100,000 as compensatory damages as to each plaintiff, and the sum of $250,000 as punitive damages, in favor of both plaintiffs jointly.

3. Against defendant Charley's Club in the sum of $100,000 as compensatory damages as to each plaintiff, and the sum of $100,000 as punitive damages in favor of both plaintiffs jointly.

In addition to the foregoing, the plaintiffs will be entitled to appropriate prejudgment interest, together with Rule 54(b) costs.

Counsel for the defendants are to prepare an Order granting Summary Judgment as to the cap on compensatory damages in accordance with this Court's decision. Counsel for the plaintiff is to prepare an Order setting forth this Court's decision and the basis therefore, for denying the Motion for Summary Judgment as it relates to the requested cap on punitive damages.

Counsel for the plaintiff should prepare a separate Order indicating that this Court declines *sua sponte* to rule, as suggested by the *amicus curiae* intervener, Utah Licensed Beverage Association, that the Dramshop Act provides no recovery for persons damaged by death, and again set forth the reasons therefore.

Those respective Orders should be submitted to the Court in accordance with the Code of Judicial Administration.

Finally, the plaintiff should prepare a form of Judgment, also in accordance with this Court's decision contained herein, and submit the same to the Court for review and signature.

Dated this 24 day of September, 1996.

S/
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

Appendix D

IN THE SUPREME COURT OF THE STATE OF UTAH

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Adkins v. Uncle Bart's Inc., **No. 970261-SC**

- - -

This matter is before the Court upon a Petition for Rehearing filed on February 22, 2000, by Appellant.

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

FOR THE COURT:

Date May 31, 2000

S/
Christine M. Durham
Supreme Court Justice

Appendix E

DRAMSHOP LIABILITY

(Effective at the time of Decedent's Death)

32A-14-101. Liability for injuries resulting from distribution of alcoholic beverages – Cause of action – Statute of limitations – Employee protections.

(1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage, to the following persons, and by those actions cause the intoxication of that person is liable for injuries in person, property, or means of support to any third person, or parent of that third person, resulting from the intoxication:

(a) any person under the age of 21 years;

(b) any person who is apparently under the influence of intoxicating alcoholic beverages or products or drugs;

(c) any person whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs; or

(d) any person who is a known interdicted person.

(2) An employer is liable for the actions of its employees in violation of this chapter.

(3) A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the alcoholic beverage in violation of Subsection (1).

(4) If a person having rights or liabilities under this chapter dies, the rights or liabilities provided by this chapter survive to or against that persons estate.

(5) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after July 1, 1985 I s limited to $100,000 and

the aggregate amount which may be awarded to all persons injured a result of one occurrence is limited to $300,000.

(6) An action based upon a cause of action under this chapter shall be commenced within two years after the date of injury.

(7) Nothing in this chapter precludes any cause of action or additional recovery against the person causing the injury.

(8) (a) A sanction or terminate of employment may not be imposed upon any employee of any restaurant, airport lounge, private club, on-premises beer retailer, or any other establishment serving alcoholic beverages as a result of the employee having exercised the employee's independent judgment to refuse to sell alcoholic beverages to any person the employee considers to meet one or more of the conditions described in Subsection (1).

(b) Any employer who terminates an employee or imposes sanctions on the employee contrary to this section is considered to have discriminated against that employee and is subject to the conditions and penalties set forth in Title 34, Chapter 35, the Utah Antidiscriminatory Act.

Appendix F

DRAMSHOP LIABILITY

32A-14-101. Liability for injuries resulting from distribution of alcoholic beverages – Cause of action – Statute of limitations – Employee protections.

(1) (a) Except as provided in Subsection (9), a person described in Subsection (1)(b) is liable for:

(i) an injury in person, property, or means of support to:

(A) any third person; or

(B) the heir, as defined in Section 78-11-6.5, of that third person; or

(ii) for the death of a third person.

(b) A person is liable under Subsection (1)(a) if:

(i) the person directly gives, sells, or otherwise provides an alcoholic beverage:

(A) to a person described in Subsection (1)(b)(ii); and

(B) as part of the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products;

(ii) those actions cause the intoxication of:

(A) any individual under the age of 21 years;

(B) any individual who is apparently under the influence of intoxicating alcoholic products or drugs;

(C) any individual whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs; or

(D) any individual who is a known interdicted person; and

(iii) the injury or death described in Subsection (1)(a) results from the intoxication of the individual who is provided the alcoholic beverage.

(2) (a) A person 21 years of age or older who is described in Subsection (2)(b) is liable for:

(i) an injury in person, property, or means of support to:

(A) any third person; or

(B) the heir, as defined in Section 78-11-6.5, of that third person; or

(ii) for the death of the third person.

(b) A person is liable under Subsection (2)(a) if:

(i) that person directly gives or otherwise provides an alcoholic beverage to an individual who the person knows or should have known is under the age of 21 years;

(ii) those actions cause the intoxication of the individual provided the alcoholic beverage;

(iii) the injury or death described in Subsection (2)(a) results from the intoxication of the individual who is provided the alcoholic beverage; and

(iv) the person is not liable under Subsection (1), because the person did not directly give or provide the alcoholic beverage as part tot the commercial sale, storage, service, manufacture, distribution, or consumption of alcoholic products.

(3) Except for a violation of Subsection (2), an employer is liable for the actions of its employees in violation of this chapter.

(4) A person who suffers an injury under Subsection (1) or (2), has a cause of action against the person who provided the alcoholic beverage in violation of Subsection (1) and (2).

(5) If a person having rights or liabilities under this chapter dies, the rights or liabilities provided by this chapter survive to or against that person's estate.

(6) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter that arises after January 1, 1998, is limited to $500,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to $1,000,000.

(7) An action based upon a cause of action under this chapter shall be commenced within two years after the date of the injury.

(8) Nothing in this chapter precludes any cause of action or additional recovery against the person causing the injury.

(9) (a) An employer may not sanction or terminate the employment of an employee of a restaurant, airport lounge, private club, on-premise beer retailer, or any other establishment serving alcoholic beverages as a result of employee having exercised the employee's independent judgment to refuse to sell alcoholic beverages to any person the employee considers to meet one or more of the conditions described in Subsection (1).

(b) Any employer who terminates an employee or imposes sanctions on the employee contrary to this section is considered to have discriminated against that employee and is subject to the conditions and penalties set forth in Title 34A, Chapter 5, Utah Antidiscrimination Act.

(10) This section does not apply to a general food store or other establishment licensed under Chapter 10, Part 1, to sell beer at retail for off-premise consumption.

Appendix G

INTENT LANGUAGE FOR SUB S.B. 112

In passing 1st **Substitute Senate Bill 112,** Dramshop Liability Amendments, the Legislature intends the following:

- *The express inclusion of wrongful death to Section 32A-14-101 does not create a new right but merely clarifies that a person has the right to recover both special and general damages for wrongful death under the Dramshop Act.*

- *The bill does not modify any common law right that exists for injuries or wrongful death resulting from giving, selling, or otherwise providing alcoholic beverages.*

- *This bill expressly extends liability to a private person if:*

- *that person, age 21 or older, directly provides alcoholic beverages to someone under age 21;*

- *the person knows or should have known that the person provided the alcohol is under age 21;*

- *the person provided the alcohol becomes intoxicated; and*

- *the intoxication results in an injury or wrongful death.*

This bill is not intended to hold a private person liable if that person unknowingly provided access to an alcoholic beverage in a noncommercial setting (i.e., leaving

a liquor cabinet unlocked), because that person did not "directly" provide the alcoholic beverage to the minor.

Appendix H

INTENT LANGUAGE FOR SUB S.B. 112

On motion of Senator Buhler, the following intent language is printed in the Senate Journal. Senator Mayne commented.

The express inclusion of wrongful death to Section 32A-14-101 does not create a new right to recover both special and several damages for wrongful death under the Dramshop Act.

The bill does not modify any common law right that exists for injuries or wrongful death resulting from giving, selling, or otherwise providing alcoholic beverages.

This bill expressly extends liability to a private person if:

that person, age 21 or older, directly provides alcoholic beverages to someone under age 21;

the person knows or should have known that the person provided the alcohol is under age 21;

the person provided the alcohol becomes intoxicated; and

the intoxication results in an injury or wrongful death.

This bill is not intended to hold a private person liable if that person unknowingly provided access to an alcoholic beverage in a noncommercial setting (i.e., leaving a liquor cabinet unlocked), because that person did not "directly" provide the alcoholic beverage to the minor.

Appendix I

PUNITIVE DAMAGES AWARDS

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs prohibited by Section 41-6-44. . . .

Appendix J

78-11-6. Injury or death of child — Suit by parent or guardian.

Except as provided in Title 35, Chapter 1, Workers' Compensation, a parent or guardian may maintain an action for death or injury of a minor child when the injury or death is caused by the wrongful act or neglect of another. Any civil action may be maintained against the person causing the injury or death or, if the person is employed by another person who is responsible for that person's conduct, also against the employer. If a parent, stepparent, adoptive parent, or legal guardian is the alleged defendant in an action for the death or injury of a child, a guardian ad litem may be appointed for the injured child or a child other than the deceased child according to the procedures outlined in Section 78-7-9.

UTAH CONSTITUTION

Article I § 7, due process of law

No person shall be deprived of life, liberty, or property without due process of the law.

Article I § 11, courts open – redress in injuries

All courts shall be open, and every person, for an injury done to him in his person, property, or reputation shall have remedy by due course of law . . .

Article I § 24, uniform operation of law

All laws of a general nature shall have uniform operation.

Article I § 27, fundamental rights

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

Article XVI § 5, injuries resulting in death – damages

The right of action to recover damages for injuries resulting in death, shall never be abrogated and the amount recoverable shall not be subject to any statutory limitation,

except in cases where compensation for injuries resulting in death is provided by law.